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# EMPLOYMENT ALERT

## IN THIS ISSUE

### CDH Employment Practice Case Law 2020 Booklet - "A Changing Work Order"

### Consistency (and safety) is key

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## CDH Employment Practice Case Law 2020 Booklet - “A Changing Work Order”

**Unprecedented: A strong contender – after COVID-19 and lockdown - for the word of 2020. This year has shifted almost every aspect of our lives, from the ways we socialise to how we shop; from how we exercise to where we work. These drastic changes have introduced, swiftly and almost universally, complex and novel employment law issues into the workplace. The Case Law 2020 booklet highlights recent South African case law, providing guidance into some of the difficult challenges currently confronting employers and employees.**

To survive and even thrive within the new status quo, businesses need to “pivot” (yet another word that has earned significant market share in 2020’s vocabulary). As your trusted

business advisor, the CDH employment practice has compiled our 7<sup>th</sup> annual case law booklet to assist you in navigating the “Changing Work Order”. From Retrenchments during these tough economic times to supervening impossibility of performance and individual case law, the Case Law 2020 booklet will guide you in all matters employment related.

In addition to the latest case law, this year we have also included summaries of important directives, regulations and legislation, including a summary of the Protection of Personal Information Act 4 of 2013 and a summary of the Employment Equity Act Amendment Bill, 2020.

For a copy of our Case Law 2020 Booklet: “A Changing Work Order”, [please click here](#)

# A CHANGING WORK ORDER

# CASE LAW UPDATE 2020

CLICK HERE to access CDH’s 2020 Employment Law booklet, which will assist you in navigating employment relationships in the “new normal”.

## Consistency (and safety) is key

The issue of inconsistency in sanction is one that has had serious ramifications for many employers. CCMA Commissioners have often reinstated errant employees where employers have been inconsistent in the application of discipline.

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In the Samancor matter the employees were part of a crew working in an area of the mine which was affected by a vertical fault. This made the area unsafe and dangerous to work in. The mine shift boss visited the area and instructed the crew not to drill or blast in the area until temporary support and safety net had been installed. This was required in terms of the mine's basic security and safety standards.

Shortly thereafter, the mine overseer visited the area and found the crew drilling without any temporary support or and safety net having been installed. He

issued a verbal instruction to the crew to cease drilling and to install the temporary support and safety net before they could proceed to drill.

When the mine overseer later returned to the area, he found that the crew had ignored his instruction and continued working without taking the requisite safety measures. He then issued the crew with a written instruction to comply with the safety measures. This instruction was also disobeyed. This led to disciplinary proceedings against the employees, and ultimately to their dismissals.

The employees referred a dispute to the CCMA. The Commissioner who heard the dispute found that the employees had been guilty of working without installing temporary support and safety net. However, he found that one employee, allegedly the girlfriend of the mine overseer, who had been part of the crew had not been dismissed. Accordingly, he found that the dismissal of the employees was substantively unfair and ordered that they be reinstated.

## EMPLOYMENT REVIVAL GUIDE

### Alert Level 1 Regulations

On 16 September 2020, the President announced that the country would move to Alert Level 1 (AL1) with effect from 21 September 2020. AL1 of the lockdown is aimed at the recommencement of almost all economic activities.

**CLICK HERE** to read our updated AL1 Revival Guide.  
Compiled by CDH's Employment law team.



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## Consistency (and safety) is key

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This judgment clarifies that mere inconsistency in sanction is not enough to allow other employees to profit from it.

Samancor, dissatisfied with the outcome, took the award on review. The Labour Court dismissed the application, finding that the evidence did not show that the crew had continued to work in defiance of the instructions issued by the mine overseer and that Samancor had failed to "prove on a balance of probabilities that the employees had defied the written instruction issued to them".

Samancor took the decision of the Labour Court on appeal. The LAC found that there was no rational basis for the Labour Court's finding that the employees had not continued to work in defiance of the instruction. The court highlighted the issue of safety, especially in the mining sector which has been under tremendous scrutiny regarding safety measures due to the dangerous nature of the work. The LAC found that where the conduct of employees carries a high risk of potential danger to the safety of others (which was the case in this matter) and there is manifest disregard for safety regulations, dismissal is clearly justified.

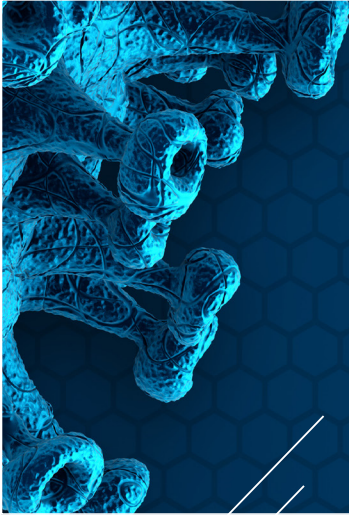
The LAC also addressed the issue of inconsistency in disciplinary proceedings. It found that there was no inconsistency as the employee who had not been dismissed had not been present when the initial instructions were given, since she had been instructed to fetch explosives.

Notwithstanding, the LAC found that the finding of inconsistency of discipline could not come to the aid of the other employees. The Court referred to the case of *SACCAWU and others v Irvin and Johnson Limited* where the LAC had previously found that:

*"if a chairperson conscientiously and honestly, but incorrectly, exercise his or her discretion in a particular case in a particular way, it would mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employee's profit from that kind of wrong decision. In a case of plurality dismissal, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy."*

This judgment clarifies that mere inconsistency in sanction is not enough to allow other employees to profit from it. The inconsistency must be capricious, or induced by improper motives to be unfair. Employers must however be vigilant and avoid inconsistency in sanction. As demonstrated in this case many commissioners do not properly apply the law when it comes to inconsistency challenges in the CCMA.

*Jose Jorge and Kara Meiring*



## COVID-19 WORKPLACE HEALTH AND SAFETY ONLINE COMPLIANCE TRAINING

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Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2020 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 in Band 3: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.



Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

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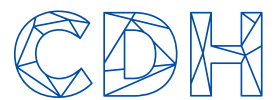


## POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

[CLICK HERE](#) to read our updated guide.



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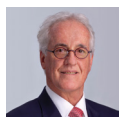
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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

### PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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